

DOCUMENT RESUME

02089 - [A1232223]

[Protest That Awardee Lacks ICC License for Motor Carriers in Its Own Corporate Name]. B-188026. April 29, 1977. 5 pp.

Decision re: Sillico, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Army: Field Artillery Center, Fort Sill, OK; Chevalley Moving & Storage of Lawton, Inc.

Authority: 54 Comp. Gen. 66. 54 Comp. Gen. 509. 55 Comp. Gen. 1057. 55 Comp. Gen. 1056. 53 Comp. Gen. 750. B-183646 (1976). B-185366 (1976).

A provision in an invitation for bids which requires bidder to indicate its "ICC Operators Authority" is a definitive criterion of responsibility, compliance with which is subject to GAO review. A recent ICC decision required the bidder to have Operators Authority in its own name. The contracting officer should determine if the low bidder can meet that requirement in view of its corporate arrangement. (Author/DJM)

02089

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-188028

DATE: April 29, 1977

MATTER OF: Silco, Inc.

DIGEST:

IFB provision which requires bidder to indicate "his ICC Operators Authority * * *" is definitive criterion of responsibility compliance with which is subject to review by GAO. Further, in view of recent ICC decision in Bud's Moving & Storage, Inc., Petition for Declaratory Order, IFB provision should be read as requiring bidder to have operating authority in its own name. GAO recommends that contracting officer determine if low bidder can meet that requirement in view of its corporate arrangement.

Invitation for bids (IFB) No. DABT39-77-B-0004 was issued by the U.S. Army Field Artillery Center at Fort Sill, Oklahoma (USAFAC) for the procurement of packing, crating and drayage services for household goods in various Oklahoma counties and parts of Texas. Chevalley Moving and Storage of Lawton, Inc. (Chevalley of Lawton) was determined to be the low bidder on schedules I and II (outbound and inbound services). Silco, Inc. (Silco), which does business as C.K. Transfer and Storage Co., protests any award to Chevalley of Lawton because that firm is not licensed in its own name by the Interstate Commerce Commission (ICC) to perform the services specified in the solicitation as required by the recent ICC decision in Bud's Moving and Storage, Inc., Petition for Declaratory Order, 126 M.C.C. 58 (1977). Award has not been made by USAFAC pending resolution of this protest.

IFB required that:

"Contractor will indicate his ICC Operators Authority as a carrier or license as a broker to cover the transportation or the arranging of the transportation of shipments moving in Interstate Commerce by inclusion of the applicable ICC authority number or broker license number."

In response, Chevalley of Lawton cited the ICC operating authority of Chevalley Moving and Storage, Inc., a firm for which Chevalley of Lawton acts as agent.

The contracting officer found that the IFB did not require a bidder to possess ICC operating authority in its own name, and concluded that, since Chevalley of Lawton had an agency agreement to move household goods under Chevalley, Inc.'s ICC operating authority, Chevalley of Lawton was a responsible bidder under the terms of the IFB.

As a general rule, this Office does not review affirmative responsibility determinations unless fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, 54 Comp. Gen. 86 (1974), 74-2 CPD 64 and Yardney Electric Co., 54 Comp. Gen. 509 (1974), 74-2 CPD 376. In the latter situation, "meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actually a prerequisite to an affirmative determination of responsibility." Haughton Elevator Division, et al., 55 Comp. Gen. 1051, 1056 (1978), 78-1 CPD 294. A specific requirement for a Federal license is such a definitive responsibility criterion and compliance therewith is a matter reviewable by this Office. In Red River Transfer & Storage Co., B-183646, June 4, 1976, 76-1 CPD 359, we declined to consider a matter where the solicitation required the successful bidder to possess "appropriate ICC operating authority." Our declination there, however, was based on the unresolved state of the law (the contracting officer had received conflicting legal advice from the ICC as to whether the bidder was required to have operating authority in its own name) and the "indefinite requirement" for operating authority set forth in the solicitation. It was our view that, in the absence of a solicitation requirement that the prospective contractor hold operating authority in its own name and in light of the conflicting views of ICC personnel as to the proper interpretation of the law, there was no definitive IFB criterion against which the reasonableness of the contracting officer's determination could be measured. That is not so in the instant case.

We have previously held that where an invitation requires a bidder to have ICC operating authority but does not specifically require the bidder to possess such authority in its own name, the bidder need not possess such authority in its own name to be eligible for contract award. Modern Moving and Storage,

B-188026

B-185366, May 24, 1976, 76-1 CPD 338; see Victory Van Corporation, et al., 53 Comp. Gen. 750 (1974), 74-1 CPD 178. The contracting officer's determination in this case is consistent with that holding.

However, subsequent to the contracting officer's determination, the ICC, in Bud's Moving & Storage, Inc., supra, held:

"* * * the performance of incidental transportation in connection with pack and crate service by a local uncertificated agent 'using' its van line principal's authority to be a clear violation of the law. We interpret the Interstate Commerce Act as requiring a contractor on a government containerization contract, actually performing the transportation service, to hold in its own name either section 206 or 209 operating authority as a motor common or contract carrier. An uncertified agent may not 'use' or 'lease' the operating authority of its principal to perform the drayage service. In so deciding we make no distinction between an agent simply listing its principal's ICC motor carrier operating number in the bid and the elaborate subcontracting lease-back arrangement employed by petitioner.

* * * * *

"We find that a 'pack-and-crate' contractor for the U. S. Armed Services must hold, in its own name, operating authority as a motor carrier where it performs the incidental transportation of used household goods shipments in movements extending beyond the commercial zone boundaries of any single point in connection with the said contract; and that an agent of an authorized motor carrier cannot 'use' or 'lease' the operating authority of the principal."

The Army recognizes that this decision is directly on point since its pack and crate contractor would be performing incidental transportation services beyond the commercial zone boundaries of any single point. It further recognizes that if award is made to Chevalley of Lawton, the Government may have to terminate for default. Nonetheless, the Army proposes to award to Chevalley of

B-188026

Lawton because 1) such a award "would be in accordance with the terms of the solicitation," and 2) the Army has petitioned the ICC to reconsider its decision and it is the Army's understanding "that this action will have the effect of staying ICC's decision in Bud's case until the ICC acts on the Army's petition for reconsideration."

We cannot agree with the Army's position. Our decisions holding that a bidder need not possess operating authority in its own name unless specifically required to do so by the solicitation were based on the state of the law as it then existed. By virtue of the Bud's decision, the state of the law, at least with respect to the situation here, has changed. Thus, we think the IFB requirement for the listing of "ICC Operators Authority as a carrier" must now be read as requiring the listing of operating authority which the bidder possesses in its own name. Furthermore, we have been informally advised by the ICC that the Army's petition is not regarded as staying the Bud's decision and that the current law to be applied is as set forth in that decision.

We note that the Chevalley firms take the position that the holding in Bud's is inapplicable to their situation because they are not involved with the type of "elaborate subcontracting lease-back arrangement" with which the ICC was concerned and because the Lawton firm is regarded as an affiliate of the other Chevalley firm, which also owns 51 percent of the stock of the Lawton Company. In effect, the Chevalley firms assert that they are for all practicable purposes one and the same and that the Lawton firm therefore is legally entitled to utilize the ICC operating authority of the parent company.

The ICC decision is not as circumscribed as Chevalley suggests. The decision clearly encompasses situations of "an agent * * * listing its principal's ICC motor carrier operating number" as well as the subcontracting arrangement. Thus, since Chevalley of Lawton, a separate and distinct legal entity, has an agency agreement with the parent Chevalley firm and it was on this basis that the contracting officer determined Chevalley of Lawton to be responsible, the Bud's decision would appear to be applicable here. On the other hand, the ICC in Bud's was not concerned with parent/subsidiary corporate relationships; it was faced with a solicitation where a local carrier was an agent for and subcontracted work to a major van line authorized to operate as a motor carrier throughout most of the country. It may be, therefore, that the ICC would view the Chevalley arrangement as a permissible one.

B-188028

However, there is nothing in the record to indicate that this aspect of the situation has been considered by the contracting officer or that Chevalley has undertaken to ascertain an ICC position on the matter. We think it would be appropriate for the contracting officer, in light of the Bud's decision, to reconsider the responsibility determination, taking into account not only the holding in Bud's and the views expressed herein with respect thereto, but also whether Chevalley's corporate arrangement takes the situation outside the scope of Bud's.

W. K. Miller
Deputy Comptroller General
of the United States